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On what sin (and grace) can teach crime

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Abstract

In the Catholic moral tradition, what is expected of the person is that he inform and follow conscience; the person becomes *morally* perfected by responding to his God-given desire for the real and the good. A criminal law shaped by Catholic principles, therefore, would sanction the criminalization not only of (some) intentional wrongs but also of (some) negligent wrongs; it would understand negligence, however, as the person's failure to do his personal best to seek the real and the good. A Catholic criminal law would not purport to demand virtue; it would both call for and respect an individual's conscientious, diligent quest for the good.

Key Words

crime • diligence • individualization • negligence • virtue

A CATHOLIC QUESTION ABOUT CRIMINAL LAW

Life founded upon social contract would be only as difficult to govern as the controlling agreement was difficult to interpret and enforce. What we could legitimately require of each other (as citizens) could be determined through an authoritative interpretation of the governing agreement – resolving as best we could the inevitable hermeneutical conundrums and leaving it at that. If, however, we resist the Siren song of legal fiction and would found our common life on the real in all its amplitude, we must be prepared to go deep and perhaps even high. In a polity committed to reality, the anointed who would say what we can legitimately ask of fellow citizens on pain of our attaching criminality (and consequent punishment) will need to understand human nature. And 'nature', as Gerard Manley Hopkins tells us, 'is never spent' – which is to say nothing of what exceeds but is already knitted into the purely natural, what religious people sometimes mean by the *supernatural*. 'No philosophical pretensions', Jacques Maritain observes in this vein, 'can abrogate the fact that man as we know him is not in a state of pure nature, but of nature at once fallen and redeemed. The first obligation for a philosopher is to recognize what is' (Maritain, 1938: xii). What, then – who, then – is the criminal?

It is familiar historical fact, of course, that the basic elements of the Anglo-American criminal law deployed every day across this country were forged when it was taken for granted – even if was not taken always seriously – that English law should be as Christian as the state sponsoring it aspired (or at least claimed) to be. Equally familiar to this audience is the fact that for centuries, something we now call political liberalism has invited us to trim our collective Christian sails in deference to the entailments of an account of justice said to be the more just because it is shared, or at least is shareable, by more westerners than count themselves Christian.

But Christians, as Jeffrie Murphy reminds us here, are surely committed, at least aspirationally, to the (putative) facts about Christ – indeed, about the triune God – and what they mean for the human condition *before* they are committed to anything else, even to a theory of justice. The American Jesuit John Courtney Murray hit this nail squarely on its head, at least for Catholics:

The principles of Catholic faith and morality stand superior to, and in control of, the whole order of civil life. The question is sometimes raised, whether Catholicism is compatible with American democracy. The question is invalid as well as impertinent; for the manner of its position inverts the order of values. It must, of course, be turned around to read, whether American democracy is compatible with Catholicism. (Murray, 1988: 1)

Murray's Catholic position is of course contestable, and frequently contested. Believing that it can be justified, I here treat it as axiom.

The question I wish to explore in light of this axiomatic premise concerns what the distinctively Catholic understanding of the human condition means for what we properly can demand of our fellows in the name of the criminal law. Put another way: What does the Catholic understanding of the human person mean for how we should regard one another when it is the strong arm of the criminal law being swung?

This requires at the outset saying something about what counts as 'Catholic' with a capital 'C', which turns out to be trickier than one might expect, particularly if one reads the *New York Times* – where sometimes a position is treated as 'Catholic' because the Pope *perhaps* implied it in a recent homily, while at other times the publicly stated positions of theologians considered renegade by that same Pope are hinted at as the *genuine* Catholic article. The truth probably is somewhere in between – or rather, more precisely, what Catholics can affirm as true in matters of faith and morals emerges from the dialectical relationship between, on the one hand, the Holy Father exercising the Petrine office in concert with the bishops of the whole Church, and, on the other hand, the prayer and belief of theologians and other Catholics constituted in what that same ecclesial magisterium calls *sensus fidelium*. As the Second Vatican Council (1962–5) teaches, Insight grows into what has been handed down (Vatican Council II, 1965a: 8); and insights worth living by come, as does every insight, from mind. The Catholic voice is the speech of minds alert to the authentic import of what has been handed down, minds part of a dynamic tradition. What I am asking is what today's Catholic can say, and should say, about our criminal law. Not every Catholic will hasten to my interpretations of Catholic teaching, but I do mean to confine myself to claims a Catholic *can* affirm secure in her orthodoxy.

My interest, as I have indicated, is the Catholic mind about our substantive criminal law. There is, to be sure, much that could be said about what respect the devices of our

criminal procedure apparatus show men and women. But as George Fletcher noted nearly a third of a century ago, 'The paradox of criminal law reform in the United States is that we are so engaged by the glittering constitutional issues of criminal procedure that we hardly notice the injustices rampant in the substantive criminal law.' 'The common law of crimes', Fletcher continues, 'is still replete with primitive devices, like presumptions of guilt, shifts in the burden of persuasion, objectified standards of responsibility, and strict liability, all of which simplify the process of convicting both culpable and nonculpable offenders' (Fletcher, 1971: 436). What Fletcher said of the 'common law of crimes' is also true, in some measure, of that great would-be reform of our substantive criminal law, the Model Penal Code. As Herbert Wechsler noted now half a century ago, the criminal law 'governs the strongest force that we permit official agencies to bring to bear on individuals' (Wechsler, 1952: 1097-8). Despite some impressive innovations, however, Wechsler's reformist effort teems with objectified standards of responsibility, permits strict or rather 'absolute' liability, and otherwise allows nonculpable offenders to be judged criminal.

Many of the devices Fletcher refers to as 'primitive' are of course the darlings of the social engineers who emphasize the responsibility of the criminal law to protect society and its constituent individuals from the harm errant individuals would inflict. Holmes is exemplary when he asserts that 'the criminal law' 'has for its immediate object and task to establish a general standard, or at least general negative limits, of conduct for the community, in the interest of the safety of all' (*Commonwealth v. Pierce*, 1884: 176).¹ It was Holmes's judgment, in that memorable language in *The common law*, that

if, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbours, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbours than if they sprang from guilty neglect. His neighbours accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account. (Holmes, 1881: 108)

Whether Holmes is right about the courts of Heaven is, one might say, the question I wish to explore, hoping to find in the theologians' intimations of those courts insight into what we should be doing in the courts of our creation. My conclusion is that what the Catholic God, at least, asks of his human creatures in His courts is their diligent efforts to do the good; the divine judgment in the Catholic tradition does not require of creatures their success either in doing good or even in just avoiding harm. Quite simply, correct conduct in the world, including the avoidance of harm, may sometimes exceed even the diligent agent's aptitude – and as St Augustine, no one's laxist, affirmed, *Deus impossibilia non iubet*, God does not demand the impossible (Mahoney, 1987: 48-57). And what God does not ask, neither, I think, should the neighbors. A threshold question in the criminal inquiry must be *whether* this defendant could have avoided transgressing the statute at issue; the question at the core of the criminal adjudication must be whether the defendant failed diligently to seek the good (and avoid evil).

All this in due course, but first a few final words of introduction. What I am arguing, in accord with most current academic sensibility about the criminal law, is that *criminality*, particularly 'feloniousness', must be 'grounded securely' (as the Model Penal Code has it) 'in the subjective culpability of the actor' (American Law Institute, 1980: 210.2

comm.). What I am arguing, further, is that for the Catholic the notion of 'subjective culpability' is and must be shaped by his tradition's understanding of the human condition, of its understanding of goodness and virtue, vice and sin, nature and grace. If the criminal law purports to pass moral judgment, and there can be little question that it does – then for the Catholic surely that judgment should reflect the Catholic tradition's distinctive understanding of what the human is morally responsible for. Whether Catholics should sanction the seemingly tawdry business of our sitting in moral judgment of one another *in the first place*, is a question I reserve to the end.

SIN, DESIRE, DILIGENCE

Acts and errors

Perhaps the place to begin to understand what the Catholic mind adjudges condemnable is the Catholic tradition's concept of personal *sin*, and as I converge on that concept I am reminded of the innocent inquiry of an acquaintance, indeed a Catholic acquaintance, who had just finished reading a novel by the Reverend Andrew Greeley, priest of the Archdiocese of Chicago: 'Why', she asked, 'are Catholics so obsessed with birth control? It's not like contraception is one of the Ten Commandments.' My interlocutor had it right that Catholics hear from the pulpit that the use of artificial contraception 'is a sin', and she also had it right, if not clear in her own mind, that sin frequently is made out to be exactly the transgression of law, such as the Decalogue, or (as in the case of artificial contraception) natural law which itself is understood to be a sharing in the 'eternal law' that is the very mind or will of God. This legalistic approach to sin is in some measure invited by Catholic practice in the sacrament of penance, and more specifically in the institutional form of auricular confession in which, according to the *Code of Canon Law* as revised and promulgated in 1983, sins are to be confessed according to 'kind and number (*in specie et numero*)' (*Codex Iuris Canonici*, 1983: §988).

The 'doing x is a sin' mentality – where x can be anything from copulating with a condom on or coming late to Mass, to napalming babies or bombing innocents in Baghdad – is what subtends the sober judgment of Jesuit moral theologian John Mahoney:

for all its preoccupation with sin and its busy cataloguing of sins . . . [Catholic] moral theology has not always appeared to take sin itself seriously enough. It has invested numerous actions with an inherent capacity for moral commitments which they could not bear . . . It has, indeed, almost domesticated and trivialized sin, like the scientist or zoologist handling deadly specimens with careless familiarity. (Mahoney, 1987: 32)

Mahoney counsels the alternative, 'a healthy respect for real sin' (Mahoney, 1987: 32). The point is not only well taken but relevant. A moral theology that fails to take sin seriously hardly can be expected to carry much weight on the question of the moral preconditions of criminality.

What, then, *does* the Catholic voice say when it means to take sin *seriously*? The venerable terms come, in large measure, from the analysis advanced by Aquinas in the 13th century, particularly in his *Summa theologiae* – composed, it will not be amiss to observe,

as a primer for confessors, men called upon to take the measure of sin and sinner and perhaps to meet out penance and grant absolution.² His questions are the ones about whether the person did the right thing, for the right reason, in the right circumstances – or, more technically: Were the object (the formal matter of the act), the agent's intention and the circumstances all of them *right* (or, *correct*)? Any defect – whether in the object, intention or circumstance – results in 'the act's' being disordered and thus incapable of instantiating what is good for the person. In the dictum of Pseudo-Dionysius approved by Aquinas and bequeathed to the tradition: 'Good results from the entire cause, evil from each particular defect (*bonum causatur ex integra causa, malum autem ex singularibus defectibus*)' (see Aquinas, 1947: I–II, 19, 6 ad1; 676).

From this it does not follow, however, that every disordered act amounts to sin, let alone mortal (or serious) sin. For a disordered act to rise to the level of mortal sin, certain conditions must be met. In the language of the *Catechism of the Catholic Church* of today, for a disordered act to eventuate in mortal sin, the act must involve 'grave matter' and the actor must have with respect to it 'full knowledge and deliberate consent (*plena conscientia et deliberato consensu*)' (Pope John Paul II, 1997: §1857).³ The magisterial text continues a little further along:

Mortal sin requires *full knowledge and complete consent* (*plenam cognitionem . . . plenumque consensum*). It presupposes knowledge of the sinful character of the act, of its opposition to God's law. It also implies a consent sufficiently deliberate to be a personal choice. (Pope John Paul II, 1997: §1859, emphases in original)

There is in the language I have just quoted a host of heavily freighted terms, but for present purposes the basic idea is clear enough: a disordered act involving grave matter becomes a mortal sin by the actor's freely choosing to perform it, knowing that it is wrong.

But what of the disordered act done by an actor who does not know that it is disordered? What of the person who does wrong thinking it is right, or at least not thinking it is not wrong? 'Ignorance', as John Mahoney comments incisively, 'is the major escape clause in objective morality' as it developed in the tradition of Catholic moral theology (Mahoney, 1987: 193). The *Catechism of the Catholic Church* teaches, just down the page from the language I quoted above: 'Unintentional ignorance (*ignorantia involuntaria*) can diminish or even remove the imputability of a grave offense' (Pope John Paul II, 1997: §1860). What the *Catechism* treats thus as a question of imputability, the tradition, and particularly Aquinas, most often treat as a question of whether the unintentionally ignorant actor is to be 'excused'. The formulation of the 'escape clause' made canonical by Aquinas is this, in two parts:

First, the case of ignorance of fact: 'If the error arise from the ignorance of some circumstance, and without any negligence, so that it cause the act to be involuntary, then that error of conscience or reason excuses the will, that abides by that erring reason, from being evil.'

Second, the case of ignorance of the moral law: 'If erring reason tell a man that he should go to another man's wife, the will that abides by that erring reason is evil; since this error arises from ignorance of the Divine Law, which he is bound to know.' (Aquinas, 1947: I–II, 19, 6c; 676)

The doctrinal result, in short, is that ignorance of the law does not excuse (because man is 'bound' to know it), while ignorance of fact does excuse so long as the 'error of conscience or reason' is not the result of 'any negligence'.

From acts to persons

The first thing to note is that in the traditional Catholic analysis there are two lines of inquiry going forward. There is, as Alan Donagan puts it, the 'first-order' question about the correctness of *the act*; for the Catholic this concerns whether the act was reasonable or unreasonable (or, in another idiom, consistent with the moral law). There is, moreover, the 'second-order' question about *the person* performing the act; for the Catholic this concerns whether the agent is good, excused or sinful (Donagan, 1977: 55). Catholic moral theologians frequently fail to keep clear this distinction between persons and their acts, and frequently those who insist on the distinction are suspected of relativism about morals. Whatever the case as to specific theologians and their enterprises – in a tradition the devout hope of which is the salvation of the person, not the collection of correct deeds, surely the distinction must be drawn, as it very clearly (if inconsistently) is in, for example, the *Catechism of the Catholic Church* (see Pope John Paul II, 1994: §§1699–2051), which at its promulgation Pope John Paul II described as a 'sure norm for teaching the Catholic faith' (Pope John Paul II, 1994: 5).

At all events, the Catholic moral analysis starts with attention to act, intention and circumstance, and eventually reaches the basic question about the person, the question whether he or she has informed and followed conscience – in the case of claimed ignorance of law simply invoking an irrebuttable presumption that a rational person cannot non-negligently remain ignorant of the moral law. The criminal law analysis, by contrast, sticks to the first-order question and never asks whether the defendant has informed and followed conscience (see Fletcher, 2000: 510). The traditional criminal law inquiry is the familiar one about whether the defendant's mistake was 'reasonable' – where the reasonable is judged according to the 'objective' 'reasonable man' standard, perhaps *pace* Holmes allowing some adjustment for the unelected oddities of the defendant. The modern criminal law analysis of the Model Penal Code, moreover, is to the effect that:

If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all its objectivity. (American Law Institute, 1985: 2.02 comm.)⁴

I return to this last eventuality below.

One might conclude in this light that the Catholic moral judgment is more lenient than the criminal law's, inasmuch as the former but not the latter acquits those who have followed their (informed) conscience. But the lenience, if one wants to call it that, is perhaps on the other foot. The doyens of our criminal law scholarship have fretted endlessly about whether (gross) negligence is a form of culpability sufficient to ground criminal conviction; the official Commentary to the Model Penal Code concludes grudgingly that it 'should not be wholly rejected' (American Law Institute, 1985: 2.02 comm.). But the Catholic moral analysis, by contrast, does not find sin only in intentional wrongdoing but also in negligence – the failure to inform and then follow

conscience. The question about the moral wages of ignorance turns out, then, to be the window into the inner sanctum of the Catholic anthropology.

What I wish to turn to, then, is what Catholics mean by informing and following conscience and what that might mean for a Catholic criminal law, and I would preface the discussion with three related observations: first, Aquinas is exemplary of the tradition when he teaches that sins of intent are more grave than sins of negligence (Aquinas, 1995: 82–8). Second, however, the ‘which sort of sin is weightier’ line of questioning risks obscuring the fact that what the Catholic God seems primarily to be interested in for his creatures is exactly what is frustrated by the failure to inform and follow conscience, namely, man’s search for what is good for him (Fuchs, 1981: 19–27, 105–17). Unfortunately the tradition, as John Mahoney laments, has tended to treat the moral life ‘as discontinuous; “freezing” the film in a jerky succession of individual “stills” to be analysed, and ignoring the plot’ (Mahoney, 1987: 31). When Catholics take sin *really* seriously, after the manner of the early monks who developed the practice of auricular confession, they do so by asking the place of the disordered act or the omission in the person’s over all search for the good (see Mahoney, 1987: 1–36). Third and finally, from the fact that neglect to seek the good amounts to a serious moral failing it does not follow that all harms produced through negligence should be criminalized; I am concerned at the moment only to establish the in-principle propriety of attaching criminal consequence to negligence (properly understood).

Conscience

Turning then to conscience, the Second Vatican Council had this to say in language that has become a modern *locus classicus*:

Deep within his conscience man discovers a law which he has not laid upon himself but which he must obey . . . For man has in his heart a law inscribed by God. His dignity lies in observing this law, and by it he will be judged. His conscience is man’s most secret core, and his sanctuary. There he is alone with God whose voice echoes in his depths . . . Through loyalty to conscience Christians are joined to other men in the search for truth and for the right solution to so many moral problems which arise both in the life of individuals and from social relationships. Hence, the more a correct conscience prevails, the more do persons and groups turn aside from blind choice and try to be guided by the objective standards of moral conduct. Yet it often happens that conscience goes astray through ignorance which it is unable to avoid, without thereby losing its dignity. This cannot be said of the man who takes little trouble to find out what is true and good . . . (Vatican Council II, 1965b: par. 16)

With respect to this paean, I would begin by noting, as have so many commentators, that here as elsewhere what the Fathers of Vatican II have to say about conscience is not entirely straightforward or consistent (e.g. Fuchs, 1987: 496–7). The responsibility is not entirely the Council’s. The Greek word rendered into English as conscience appears 20 times in the New Testament, and already there its meaning is far from univocal, as the multiple interpretations given it by the early Church Fathers attest (Mahoney, 1987: 184–8).

But the basic idea – clear if not universally shared from the time it was elaborated and ratified by Aquinas and in due course elided by the fathers of Vatican II in the critical passage just quoted – is that what we call ‘conscience’ is not some indwelling oracle but rather the judgment of human intelligence in a specific case about what is to be done or

avoided. As Aquinas explains, distinguishing his view from the rather more occult competitor: 'Conscience is called a spirit, so far as spirit is the same as mind; because conscience is a certain pronouncement of the mind' (Aquinas, 1947: I, 79, 13, ad1; 408). And the reason a person is not only permitted but bound to follow his conscience, Aquinas continues, is that the principles of practical reason of which it is an application are themselves the human's sharing in the eternal law which is the very mind of God, a sharing commonly referred to as 'natural law'. To act against conscience would be to act against the appearance of God's providential will in the world (Aquinas, 1947: I-II, 19, 5; 674-5) – better to worship a molten calf.

If conscience, then, is the judgment of human intelligence in the specific case, prior to conscience is what the tradition knows as *syndereisis* – a Greek word and concept without adequate English, or indeed Latin, (rough) equivalents. The basic idea is that what we call *syndereisis* is the intellect's *habitual* grasp of those principles of practical reason whose application in a specific practical judgment we call conscience.

[T]he first practical principles, bestowed on us by nature, do not belong to a special power, but to a special natural habit, which we call *syndereisis*. Whence *syndereisis* is said to incite to good, and to murmur at evil, inasmuch as through first principles we proceed to discover, and judge of what we have discovered. (Aquinas, 1947: I, 79, 12c; 407)

But even though these principles are there in man by nature, they are not equally developed among all people (see Donagan, 1977: 134).

Even more basic than these first principles of the practical intellect, and a condition of the possibility of their development (and application), is the very dynamic constituting of the person. To this piece of Christian anthropology Augustine gave most memorable expression in the first chapter of the first book of his *Confessions* when he pondered 'Thou hast formed us for Thyself, and our hearts are restless until they find rest in Thee' (Aurelius, 1999: 45). The human person, as the Catholic understands him, is constituted to desire the fullness of goodness – and thus to desire (and seek) particular goods (and ultimately Goodness Itself, God) through the application of *syndereisis* in judgments of conscience. The contemporary Jesuit theologian, Norris Clarke, summarizes well the Catholic tradition's understanding of the dynamic life of the inner man:

At the root of all intellectual inquiry . . . is the radical dynamism of the human mind toward the fullness of being as true, what Bernard Lonergan . . . calls 'the unrestricted drive of the mind to know being, that is, all that there is to know about all that there is.' Its horizon of inquiry is nothing less than the totality of being, of what truly is. This radical dynamism, both longing and capacity, without which we would never be drawn to know anything, is inborn within us, defining our nature as human and not merely animal.

Complementary to the drive of the mind to know in the human spirit is the *drive of the will* toward the fullness of being as good, as to be appreciated, loved, enjoyed, as bringing us happiness. In a sense it is even deeper than the drive to know, for, as St Thomas says, unless knowledge itself appeared to us as something good to possess, we would not be moved to desire and actively seek it. (Clarke, 2001: 14–15, emphasis in original)

This, to be sure, is not what one reads in the annals of the American Law Institute or of the Criminal Law section of the Association of American Law Schools. But if the

question is – and it *is* my question – what the Catholic mind speaks to criminal law, then such speech is not only apt but exigent. The critical fact, for any jurisprudence that will do justice to the human condition as understood by the Catholic Christian, is that it is inappropriate to approach as ‘mere actuality what is, above all, dynamic potential’ (Dupré, 1976: vii).

The point at which I arrive, then, is that this dynamic potential comes, in the Catholic understanding of it, fitted up with the basic norm governing its own realization. ‘In the most radical sense’, as Walter Conn observes, ‘*the human person’s “is” is an “ought”*’ (Conn, 1981: 214, emphasis in original). The ultimate norm for man emerges from his own given desire for the good (and for God, ultimately), and it falls to his intelligence and choice animated by that desire to discern its satisfaction. As Jesuit theologian Bernard Lonergan explains, ‘The many levels of [human] consciousness are just successive stages in the unfolding of a single thrust, the eros of the human spirit’ (Lonergan, 1972: 13). That eros, as Lonergan continues, ‘is a self-assertive spontaneity that demands sufficient reason for all else but offers no justification for its demanding’ (Lonergan, 1970: 332). Discovering his own dynamic potential for fulfillment, man discovers that he is to pursue through the (only) means available to him by virtue of his creation as creature of a certain kind – his intelligence and corresponding action – what is truly good (for man). Bedrock for the Catholic is his desire for the good, and the terms of its satisfaction are none other than appear through use of his God-given intelligence by which he distinguishes God from false gods, the Ten Commandments from 10 bad ideas, the Pope from the pretenders.

Diligence

On this anthropology, what is asked of the person – asked by his own dynamic rational consciousness – is the persistent pursuit of the good. What in the traditional parlance gets called the duty to ‘inform conscience’ is in fact at the most basic level the person’s own constitutive exigence, if you will, intelligently to seek the good to be done in the world in which he finds himself. If one simply says that what the person must do is follow the law he is bound to know, ‘the natural law’ – what one misses is the critical fact that in every case the exigence is that the person ask and answer (as best he can) questions about the particular good (see Fuchs, 1981: 125, 127). ‘Natural law’, as Michael Novak says in an innovative idiom, ‘is not constituted by an “objective code”; it is constituted by a set of dynamically related operations on the part of each individual person’ (Novak, 1967: 248–9). The good, as the Scholastics said so well, always is particular, and it is through performance of these operations that that good is discovered. Sometimes, moreover, what is to be done, the particular good, will not be clear – as the legitimate forms of casuistry founded on probable judgments attest (Mahoney, 1987: 137).

Once the issue is transposed from the petrified one of conscience and natural-law-as-code to the one about the person as called by nature to seek the good, a new question can emerge: At what rate, so to speak, should the person be about the business of asking and answering questions in pursuit of the good? This way of talking may sound odd. Again, we are accustomed, liberals and rule-abiding Catholics alike, to ask only whether we have followed the rules and omitted no extrinsically imposed duties – allowing for the possibility of the occasional decorative splash of supererogation. But if the question is whether the person is seeking the good, then the issue just is whether he is letting

questions occur and doing what he can to answer them. I would use the unfortunately colorless noun 'diligence' to describe the standard set by the 'eros of the human spirit': Our human constitution, divinely created, calls us to be at least diligent seekers of the good.

Diligence is a concept that occurs frequently enough in the literature of the Catholic moral tradition but hardly ever comes in for analysis. (Its most frequent deployment, ironically, is as a requirement of how the penitent must comb his memory for sins to confess (Mahoney, 1987: 30–1, 21, 23).⁵) Diligence's decisive characteristic, as I use it here, is that it looks to the concrete particulars of the person. It takes, in other words, full account of the fact that there obtain forces, psychological and social, that limit or block an individual's capacity to let questions occur, and that not only IQ but also the size of the inherited body of wisdom affect the quality of the answers that will be forthcoming (see Conn, 1981). As I understand it, diligence is the requirement that the person be *as much as she can* attentive, intelligent in interpreting what she has attended to, reasonable reaching judgment as to the truth of her interpretations and finally responsible in the sense of living by the judgments she has reached about the particulars.⁶ Mediaeval theologians had a way of summarizing this: the person is to do *quantum in se est* – 'what is in him' (Coons and Brennan, 1999: 164–90).⁷

These same mediaevals answer the crucial second-order question by saying that God will *grace* the one who does what is in him (Coons and Brennan, 1999: 164–90). This wants underlining. The traditional parlance often sloppily identified as 'mortal sinner' the performer of the flashy malfeasances, without sufficient attention to whether he had full knowledge and deliberate consent; and even today, the most the Catholic magisterium will say explicitly is that the person who involuntarily errs is excused or, as I mentioned earlier, does not have the evil imputed to him. Aquinas too stops short of attaching goodness or merit to man's strivings (introducing thereby incoherence into his position (D'Arcy, 1961: 76–189; see also Keenan (1992))). But that saint and doctor of the Church, Alphonsus Liguori, does not shrink from saying that the person who diligently informs and follows conscience not only avoids sin but 'probably acquires [saving] merit'. A person who honors reason by choosing the apparent goods it proposes, Liguori concludes, 'ought to be meritorious on account of the good end by which he acts' (Liguori, 1846: V, 2). Could the Second Vatican Council have meant less in its paeon to conscience: 'It often happens that conscience goes astray through ignorance which it is unable to avoid, without thereby losing its dignity. This cannot be said of the man who takes little trouble to find out what is true and good . . .' (Vatican Council II, 1965b: §16). Elsewhere the Council had this to say:

Those who, through no fault of their own, do not know the Gospel . . . but who nevertheless seek God with a sincere heart, and, moved by grace, try in their actions to do his will as they know it through the dictates of their conscience – those too [may attain] eternal salvation. (Vatican Council II, 1965c: §16)⁸

VICE ABOUT VIRTUE

To sum up then: from the basic facts of a Catholic-Christian anthropology spring three implications for the criminal law. First, the person is by nature under an obligation to

seek the good and to do his best to do the good he knows; the terms of that internally given norm should provide the basic moral standard to which rational persons can be held. Second, this anthropology, by looking concretely at the person's situation to settle what is demanded of him, gives moral effect to Augustine's insight that God does not ask the impossible, *Deus impossibilia non iubet*. What God asks, in the language of the tradition, is that the person inform and follow his conscience; what God asks, in the language I have proposed for unpacking the tradition, is that the person diligently seek the good. Third, God perhaps not only 'excuses' but graces the seeker, even the erring seeker, of the good. If the Christian God asks exactly this, can the Christian man or woman think that our criminal law could be justified in asking more? If God does not ask the impossible, are the aforementioned neighbors to be permitted such importuning? If the Christian God graciously rewards his creatures' imperfect strivings, can the neighbors be so niggardly as to require perfection?

The answer for which I have been arguing is of course in the negative, to which I would like now to consider an objection facially rather different in kind from the Holmesian one. Catholic moral theology, particularly in its more Thomistic strains, owes much to Aristotle. Aristotle, for his part, has recently been receiving, thanks to Professor Kyron Huigens of the Cardozo Law School, a powerful introduction into the analytic debate about the foundations and scope of our criminal law. Huigens's argument, relevantly, is that the Aristotelian starting point both better explains the criminal law we have and calls for bits of doctrinal or justificatory tidying up here and there. What I would suggest is that Huigens's Aristotelian criminal law would ratify and bless in the name of virtue a distinctly unchristian treatment of fellow citizens. (Huigens, for all I know, might take this as a compliment.)

The standard, liberal analyses of our criminal law would like to limit its scope to cases of conscious wrongdoing, and thus, as mentioned earlier, find negligence an embarrassing predicate on which to found criminality. Huigens finds the liberal's account of what the criminal law is or should be about inadequate and misguided, and proposes instead that *the* issue for the criminal law is or should be whether citizens are 'participat[ing] with us in the conduct and construction of our shared political life' (Huigens, 1995: 1445). To Huigens's mind, the quintessential criminal law questions are not whether the defendant consciously did proscribed harm, and, if she did, whether she should be found justified or excused. Rather, according to Huigens, the deep issue implicitly presented (Huigens, 1995: 1465) in any criminal trial is

the pattern of individual choices that led to the act and hence to the harm. The factfinder, in deciding the case, will accept or reject the decision the actor made in the circumstances she faced; and in doing so, will pass judgment ultimately, on the practical reason of that actor. The jurors will accept or reject the particular conception of the good and the scheme of ends that led the actor into the conflict and to the resulting harm. (Huigens, 1995: 1439)

Huigens designates this jury judgment 'inculpation', rather than one of 'culpability' or 'criminal responsibility' or the like, in order to focus attention on the fact that in it the jury for the community is deciding whether to find fault (*culpa*) with, and attach criminality to, the defendant's use of practical reason (with its consequences for the building up or tearing down of a community in which humans can achieve the excellences that

are the proper achievement of a human) (Huigens, 1995: 1426). 'The demand implicit in inculcation', Huigens continues,

is nothing more than the minimal demand that one's participation in an enterprise that is a necessary and inescapable part of the human condition be carried out with a due regard for, and with the constant, conscientious employment of, the rationality that defines that condition. (Huigens, 1995: 1469)

Inculcation is, in a word, 'a judgment on virtue' (Huigens, 1995: 1467).

Huigens's work is much richer than time allows me to manifest here, and the fuller account that would reveal its many virtues would, I think, have to ask whether Professor Huigens hasn't read some Habermas into the Stagirite. But what I have described of Huigens's stance is sufficient for me to put the question, Is there not vice in using the criminal law to demand virtue? Professor Huigens notes unexceptionably that 'Because of our interdependence, the good of another or of the whole may be implicated in any particular decision that any one of us may face.' He then continues immediately: 'The others have an unavoidable need, and therefore a reasonable expectation, that such decisions will be made well . . . We require, in short, that members display a certain amount of maturity, disinterestedness, and perspicacity in judging their own actions.' He sums up: 'The problem of inculcation can be approached as the task of understanding the quality of judgment that we demand of all . . .' (Huigens, 1995: 1460). But, I would ask, can we – or, rather should we – 'require' or 'demand of all' rectitude of judgment? Can we morally justify condemning (and punishing) those who diligently exercise practical reason but still do not decide 'well' what to do in the world? Catholics, I think, cannot, for the reasons adduced above.

The virtue in Huigens's account, by Catholic lights, is its acknowledging that what we should seek is not just harm-avoidance, nor just rule-abidingness – but *phronesis*, practical wisdom in the concrete particulars of the world we inhabit. Taking its bearings from the *telos* given in the rational animal that man is, the theory makes sense of what embarrasses the liberal dominant account of the grounds of criminal liability. The liberal analyst, as Huigens explains, takes his bearings from harm and 'the actor's mental posture' toward it (Huigens, 1995: 1475); where the actor is unaware of a harm that should be avoided, the liberal is then faced with an apparent vacuum. But, as Huigens explains:

If the self and society are mutually constitutive, one is inevitably, constantly, and inextricably involved in defining the good for oneself and others . . . Inculcation is premised on that responsibility for the good, not on the more narrow responsibility to avoid harm. One can therefore act culpably while being unaware of the particular risk one has created. (Huigens, 1995: 1475–6; see also Huigens, 1998)

The vice correlative to this virtue in the Huigens's account, by Catholic lights, is its not affording persons as much sensitivity as it shows to the situations in which those persons must decide and act. *Phronesis* is an ideal, not a requirement. Fallen and fallible men and women are not 'responsible' to realize the first-order good. In not acceding to this, Huigens aligns himself with Holmes, not with Heaven as Holmes imagined it – and one does not have to be Catholic to worry about such alliance. Herbert Hart, for

example, long ago called attention to the unfairness of holding the defendant to an invariant standard he cannot meet, noting that in such cases inculpation (or responsibility, as he would have it) will be made 'independent of any "subjective element"' (Hart, 1968: 152–4, 154). Antony Duff and George Fletcher are in accord (Fletcher, 1971: 436; Duff, 1990: 156), Fletcher noting that at stake is 'respect for human dignity'.

Still, many serious scholars of the morality of criminal law insist on standing with Holmes, and now can enjoy Huigens's company as well. Take, for instance, Professors Kadish and Schulhofer, who denominate the business of tailoring the criminal law's demand to the capacities of specific defendant 'individualization'. This process, they comment, 'would result in legal guilt and moral blameworthiness being made more nearly the same' (Kadish and Schulhofer, 1995: 453). Perhaps, but the comment is odd, in at least two respects. First, it assumes and never explicates (let alone argues for) a moral universe from which what we might call 'absolute moral liability' is absent – just the opposite of the moral universe affirmed by Aristotle and propounded by Professor Huigens. Taking its marching order from Athens rather than from Jerusalem, western moral theory frequently affirms absolute moral liability. Second, the comment is followed by Professor Kadish's objection that 'individualization' on cognitive grounds leads to a slippery slope that will soon land us in a position where we must, on pain of inconsistency, individualize on volitional grounds as well (in all cases of unintentional crimes). Thus, Professor Kadish finds rather sympathetic the *Williams* (1971) sort of case – where, it seems, the defendants' comparatively low intelligence and a rough or different socio-economic situation led them to misjudge their child's medical needs, with the result that the child perished; while he finds *unsympathetic* the case of the person who yields 'to a trivial threat of future harm on the ground that he is a cowardly person' (Kadish, 1987: 97). At all events, Kadish 'want[s] to argue', as he says, that in cases where the law imposes an 'objective standard', even one the defendant cannot meet, 'the law does not commit injustice in imposing blame' (Kadish, 1987: 95).

Much of Kadish's argument against 'individualization' (or at least against more of it than at present is permitted under Anglo-American criminal law) reduces to a parade of practical horrors that would attend allowing the defendant to put at issue her capacity to conform. The paraded difficulties are not insubstantial, but their sting is withdrawn by Kadish himself (here with the help of his co-author, Schulhofer) when he notes the standard of negligence followed in Germany since 1922:

A harm caused by defendants can be said to be caused by negligence only when it is established that they disregarded the care which they were obliged to exercise and of which they were capable under the circumstances and according to their personal knowledge and abilities. (Kadish and Schulhofer, 2001: 437)

The other prong of Professor Kadish's argument against 'individualization' is more weighty but in the end less threatening. It goes, in effect, to the difficulty of figuring out what a specific defendant was or was not capable of. Granting, as I mentioned, that cases of cognitive incapacity are more sympathetic than those of volitional incapacity, Kadish observes that 'the moral distinction between ability to know and ability to will is not entirely clear'. He then concludes that, 'In view of both the practical and moral complexities raised by an excuse of incapacity to know better, it is understandable that our law

does not recognize it' (Kadish, 1987: 98). Understandable, yes; but morally sustainable, this Catholic is not convinced. The business of moral condemnation is a serious one, performed in this life by fallible men and women. The argument from difficulty and complexity only suggests, I should have thought, that we would do better to err on the side of not condemning (see Fletcher, 1974: 1301–9) – unless, of course, the spectacular utility of criminal condemnation is to be said to justify punishing a person for failing to meet a standard that *ex hypothesi* she or he (perhaps) could not meet – again better, I should think, to worship that molten calf.

None of what I commend on Catholic grounds, finally, entails 'depriving the criterion of all its objectivity' (American Law Institute, 1985: 2.02 comm.). If what is asked of the person is that he be *diligent* given what he has inherited and how he is constituted, there is something to look for, something the defendant may or may not be able to lay claim to. Did he let questions occur? Was he open to the data of experience? Were there impediments to his openness, to his having insights? And so forth. I do not suggest that these questions are easy to answer in most cases. I do insist that the questions are not in principle unanswerable. Daily experience reveals to us, as we think and do not much doubt, a range of mindedness – some open, some more closed.⁹ What is asked of a person is his conscientious engagement in the search for the good (see Botha, 1977).¹⁰

TO LOVE ONE ANOTHER

Criminal law shaped by a Catholic anthropology would touch men's lives rather differently from current law. A recitation of the rules required to effect such a shift is beyond my scope here – the shift would involve not only the place and definition of negligence but also diminished capacity, ignorance or mistake of fact or of law and a host of issues concerning justification and excuse; many Continental legal systems offer instructive models (as George Fletcher among others has long reminded us), as does Canon Law itself.¹¹ Rather than with rules, I would like to end with a few contextualizing comments prompted by John Noonan's insight that '[t]he central problem of the legal enterprise is the relation of love to power' (Noonan, 1976: xii). Love, surely, must figure in any purportedly Catholic understanding of the scope and purpose of that law which operates through condemnation and penitentiaries and even the sentence of death, deployments of power imbibing much of any legitimacy they enjoy from perception that the punished *deserve* what they get.

I mentioned above the idea that to the one doing *quod in se est* God perhaps gives grace, the grace of salvation – even if the person's efforts misfire and wreak havoc on the social order. The mediaevals whose idea this was concluded that those doing their best deserve – a desert of congruity not of condignity, but a desert nonetheless – reward (see Coons and Brennan, 1999: 314 n. 45). For the Catholic-Christian the result of misadventure is not tragedy nor even, at least on some accounts, dispatch to the limbo of the 'excused'. Again in that language from Vatican II, conscience sometimes 'goes astray through ignorance which it is unable to avoid, without losing its dignity' (Vatican II, 1965b: §16). All this good news may seem hard to imagine – even Catholics have had difficulty believing it (Fuchs, 1987: 108). But as St Augustine did not shrink from saying, '*Naturae iura mutantur in homine*, in the case of man, the laws of nature are changed' (Migne, 1865: 1097–8). In the truths from Jerusalem, it may be that God

graciously rewards even the blunderer provided he is *in bona fide*. And if the Catholic affirms this as true, he affirms it as true for all people – not just for the clan. When the Catholic invites us, first, to strive for the good and to encourage our fellows too to seek the good, and, second, to respect one another's strivings (rather than just our successes), this Catholic would leaven a social loaf that needs all the help it can get. Nor do I see any reason to conclude that such a social stance would reduce the incidence of correct conduct; it does, after all, ask and insist that a person do what is in him.

But if, then, we do resist the urge to judge a man only by the appearance of his deeds, and instead look more deeply to see whether he was doing what he could to live well in the world – do we not thereby trench upon the divine jurisdiction? 'Judge not, lest ye . . .' Peter Abelard, conspicuous in his focus on the subjective element in moral guilt, required that in courts of human creation a man's wrong conduct raise an irrebuttable presumption of guilt – leaving to divine judgment the question of whether the man was guilty in fact (Berman, 1983: 189; see also Murphy, 1998). There is much to be said for the modesty of such a regime, but the Church rejected it, and in any event so have we: we are largely *committed* to requiring moral failing – *mens rea* – as a necessary condition for the judgment of criminality. Perhaps this is *ultra vires* of a state – otherwise aspiring not to represent the divine judgment – but as long as our polity adheres to this commitment, *for the Catholic* the proximate concern should be, first, that a man not be judged morally deficient for failure to meet a standard he could not meet, and second, that what moral tools we wield as a polity assist us not just to avoid harm but to seek the good and thereby to become good. For this is, I think, how we would love one another as we have been loved.

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Notes

- 1 See also *Nash v. United States* (1912) 229 U.S. 373, 377 (Holmes, J.) (quoting *Pierce*).
- 2 The purpose of the *Summa's* composition, noted by Leonard Boyle (Boyle, 1982), is rarely taken into account by those interpreting that work.
- 3 The English translations of the *Catechism* are my own from Pope John Paul II, *Catechismus Catholicae Ecclesiae* (1997), though I have consulted *Catechism of the Catholic Church* (Pope John Paul II, 1994).

- 4 In jurisprudence, the distinction between *ignorantia facti* and *ignorantia iuris* is crucial, because it is deemed everybody's duty to know what the law is, inasmuch as it applies to himself, and hence it is a legal principle that *ignorantia iuris neminem excusat*. In common morality, however, as D'Arcy (1963) has pointed out, it is otherwise. 'In the ordinary language of day-to-day moral evaluation, we speak as if ignorance (or error, or oversight, or forgetfulness, and so on) excuses or fails to excuse, not according as it bears upon matters of moral rule, law, or principle, or upon matters of relevant fact; but according as the ignorance itself is or is not culpable.' In order to render an action inculpable, ignorance must be genuine. (Donagan, 1977: 128)
- 5 Helpful studies of (or relevant to) diligence include, from a range of perspective, Ryu and Silving (1957); Erenius (1976); Milo (1984: 56–139); Hausmaninger (1985) and Parisi (1992).
- 6 My account of the processes of human cognition here is heavily indebted to Bernard Lonergan (1970), a book that received the *imprimatur*.
- 7 Coons and I have proposed the archaic verb 'obtend' to denote the subject's diligent search for the objective good (Coons and Brennan, 1999: 88–9).
- 8 The Council certainly stopped short of making *unmistakably* clear its commitment to the Liguori position (see Fuchs, 1981: 19–27, 1987), but it should also be said that the Catholic moralist's commonplace that the evil wrought by the involuntarily erring actor is not 'imputed', does not meet the issue raised by Liguori and then the Council. For the latter authorities, as I read them, diligence is, thanks to grace, the necessary *and* sufficient condition of personal moral perfection and salvation; the objective evils done by the erring but diligent agent simply do not bear on his moral status. And the moralists who have the involuntarily actor merely 'excused' seem to say importantly less on his behalf than did the Council.
- 9 Tom Kohler (2000) does a fine job of describing how individuals living (as best they can) by the unrestricted desire for the good leads to self-realization and true community.
- 10 Compare Pollock: 'Negligence is the contrary of diligence, and no one describes diligence as a state of mind' (1939: 350).
- 11 For example, in criminal proceedings Canon Law treats the question of the consequences of ignorance as a question about whether the defendant has been negligent or failed to be diligent. See *Codex Iuris Canonici* (1917) §§2199, 2207; *Codex Iuris Canonici* (1983) §§1321 et seq.

References

- American Law Institute (1980/1985) *Model Penal Code*. Philadelphia, PA: American Law Institute.
- Aquinas, Thomas (1947) *Summa theologiae*. Trans. Fathers of the English Dominican Province. New York: Benziger Brothers.
- Aquinas, Thomas (1995) *On evil*. Trans. Jean Oesterle. Notre Dame: University Of Notre Dame Press.
- Aurelius, Augustinus (1999) 'The confessions of St. Augustin', trans. J.G. Pilkington in *The Nicene and Post-Nicene Fathers*. First Series, Volume 1. Reprint of 1886 edition. Peabody, MA: Hendrickson Publishers.

- Berman, Harold (1983) *Law and revolution: The formation of the western legal tradition*. Cambridge: Harvard University Press.
- Botha, D.A. (1977) 'Culpa – a form of *mens rea* or a mode of conduct', *The South African Law Journal* 94: 29–39.
- Boyle, Leonard (1982) *The setting of the Summa theologiae of Saint Thomas*. Toronto: Pontifical Institute of Mediaeval Studies.
- Clarke, W. Norris (2001) *The one and the many: A contemporary Thomistic metaphysics*. Notre Dame: University of Notre Dame Press.
- Codex Iuris Canonici* (1917) New York: J.P. Kenedy and Sons.
- Codex Iuris Canonici* (1983) in *Code of cannon law annotated* (1993). Montreal: Wilson & Lafleur Limitee.
- Conn, Walter E. (1981) *Conscience: Development and self-transcendence*. Birmingham, AL: Religious Education Press.
- Coons, John E. and Patrick M. Brennan (1999) *By nature equal: The anatomy of a western insight*. Princeton, NJ: Princeton University Press.
- D'Arcy, Eric (1961) *Conscience and its right to freedom*. New York: Sheed & Ward.
- D'Arcy, Eric (1963) *Human acts: An essay in their moral evaluation*. Oxford: Clarendon Press.
- Daube, David (1961) '“For they know not what they do”: Luke, 23, 34', in *Studia patristica*, vol. IV, pp. 58–70. Berlin: Akademie-Verlag.
- Donagan, Alan (1977) *The theory of morality*. Chicago, IL: University of Chicago Press.
- Duff, Anthony (1990) *Intention, agency and criminal liability*. Oxford: Basil Blackwell.
- Dupré, Louis (1976) *Transcendent selfhood: The loss and rediscovery of the inner life*. New York: Seabury Press.
- Ercinius, Gillis (1976) *Criminal negligence and individuality*. Stockholm: P.A. Norstedt & Söners Förlag.
- Fitzgerald, P.J. (1963) 'Crime, sin and negligence', *The Law Quarterly Review* 79(3): 351–70.
- Fletcher, George P. (1971) 'The theory of criminal negligence: A comparative analysis', *University of Pennsylvania Law Review* 119(3): 401–38.
- Fletcher, George P. (1974) 'The individualization of excusing conditions', *Southern California Law Review* 47(4): 1269–309.
- Fletcher, George P. (2000) *Rethinking criminal law*. Oxford: Oxford University Press.
- Fuchs, Josef (1981) *Christian morality: The word becomes flesh*. Washington, DC: Georgetown University Press.
- Fuchs, Josef (1987) 'A harmonization of the conciliar statements on Christian moral theology', in Rene Latourelle (ed.) *Vatican II: Assessment and perspectives*, vol. 2. New York: Paulist Press.
- Hart, H.L.A. (1968) *Punishment and responsibility: Essays in the philosophy of law*, 2nd edn. Oxford: Clarendon Press.
- Hausmaninger, Herbert (1985) 'Diligentia quam in suis: A standard of contractual liability from ancient Roman to modern soviet law', *Cornell International Law Journal* 18(2): 179–202.
- Holmes, Oliver Wendell, Jr (1881) *The common law*. Cambridge: Harvard University Press.
- Huigens, Kyron (1995) 'Virtue and inculcation', *Harvard Law Review* 108(7): 1423–80.

- Huigens, Kyron (1998) 'Virtue and criminal negligence', *Buffalo Criminal Law Review* 1(2): 431-57.
- Huigens, Kyron (2000) 'The dead end of deterrence, and beyond', *William and Mary Law Review* 41(3): 943-1036.
- Kadish, Sanford (1987) *Blame and punishment: Essays in the criminal law*. New York: Macmillan.
- Kadish, Sanford and Stephen Schulhofer (1995) *Criminal law and its processes*, 6th edn. Boston, MA: Little, Brown & Company.
- Kadish, Sanford and Stephen Schulhofer (2001). *Criminal law and its processes*, 7th edn. New York: Aspen.
- Kahan, Dan M. (1997) 'Ignorance of the law is an excuse -- but only for the virtuous', *Michigan Law Review* 96(1): 127-54.
- Keenan, James F. (1992) *Goodness and rightness in Thomas Aquinas's Summa theologiae*. Washington, DC: Georgetown University Press.
- Kohler, Thomas (2000) 'The integrity of unrestricted desire: Community, values, and the problem of personhood', in Edward W. Lehman (ed.) *Autonomy and order: A communitarian anthology* pp. 57-70. New York: Rowman & Littlefield.
- Liguori, Alphonsus (1846) *Theologia moralis*. Turin: Marietti.
- Lonergan, Bernard (1970) *Insight: A study of human understanding*. New York: Philosophical Library.
- Lonergan, Bernard (1972) *Method in theology*. New York: Seabury Press.
- Mahoney, John (1987) *The making of moral theology: A study of the Roman Catholic tradition*. Oxford: Clarendon Press.
- Maritain, Jacques (1938) *The degrees of knowledge*. New York: Charles Scribner's Sons.
- Migne, Jacques-Paul (1844-55 and 1862-5) 'Sermo de tempore', *Patrologia Latina* 39(13).
- Milo, Ronald (1984) *Immorality*. Princeton, NJ: Princeton University Press.
- Murphy, Jeffrie G. (1998) 'Cognitive and moral obstacles to imputation', in Jeffrie G. Murphy *Character, liberty, and law: Kantian essays in theory and practice* pp. 43-58. Dordrecht: Kluwer.
- Murray, John Courtney (1988) *We hold these truths*. Kansas City: Sheed & Ward.
- Noonan, John T., Jr (1976) *Persons and masks of the law*. New York: Farrar, Straus and Giroux.
- Novak, Michael (1967) 'Bernard Lonergan: A new approach to natural law', *Proceedings of the American Catholic Philosophical Association* 41: 248-9.
- Parisi, Francesco (1992) *Liability for negligence and judicial discretion*, 2nd edn. Berkeley, CA: University of California, International and Area Studies.
- Pollock, F. and P.A. Landon (1939) *Pollack's law of torts: A treatise of obligations arising from civil wrongs in the common law*. London: Stevens.
- Pope John Paul II (1994) *Catechism of the Catholic Church*. Mahwah, NJ: Paulist Press.
- Pope John Paul II (1997) *Catechismus Catholicae ecclesiae*. Vatican City: Libreria Vaticana.
- Ryu, Paul K. and Helen Silving (1957) 'Error iuris: A comparative study', *University of Chicago Law Review* 24(3): 421-71.
- Sacrosanctum Oecumenicum Concilium Vaticanum II (1993) *Constitutiones, decreta, declarationes*. Vatican City: Libreria Editrice Vaticana.

- Vatican Council II (1965a), '*Dei verbum*', in Austin Flannery (ed.) *Vatican Council II: The conciliar and post conciliar documents* (1980), pp. 750–65. Boston, MA: St Paul Editions.
- Vatican Council II (1965b) '*Gaudium et spes*', in Austin Flannery (ed.) *Vatican Council II: The conciliar and post conciliar documents* (1980), pp. 903–1001. Boston, MA: St Paul Editions.
- Vatican Council II (1965c) '*Lumen gentium*', in Austin Flannery (ed.) *Vatican Council II: The conciliar and post conciliar documents* (1980), pp. 350–426. Boston, MA: St Paul Editions.
- Wechsler, Herbert (1952) 'The challenge of a model penal code', *Harvard Law Review* 65(7): 1097–8.

Cases

- Commonwealth v. Pierce* (1884) 138 Mass. 165.
- Nash v. United States* (1912) 229 U.S. 373.
- State v. Williams* (Wash App. 1971) 484 P.2d 1167.

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